Nebraska Law Review

Volume 56 | Issue 2 Article 12

1977

Manufacturers' Liability for Design Defects: *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976)

Terry R. Wittler

University of Nebraska College of Law, twittler@clinewilliams.com

Note

Manufacturers' Liability For Design Defects

Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976).

I. INTRODUCTION

In *Melia v. Ford Motor Co.*,[1] the Court of Appeals for the Eighth Circuit was called upon for the third time[2] in less than one year to interpret and apply the Nebraska version of strict liability in tort as it relates to alleged design defects. The difficulty of its task was magnified by the fact that the Nebraska Supreme Court has not allowed recovery under strict liability principles in any appeal it has heard since its initial endorsement of section 402A of the Second Restatement of Torts,[3] in *Kohler v. Ford Motor Co.*[4]

Melia involved a wrongful death action arising out of a right-angle, two car collision in an Omaha intersection. The plaintiff sued the driver of the colliding vehicle in state court.[5] A jury denied the plaintiff recovery, presumably finding that the plaintiff's decedent had entered the intersection against a red light and was thus contributorily negligent.[6] The plaintiff then brought an action in federal court seeking recovery from Ford Motor Company on the theory that the decedent's injuries were enhanced by the defective design of a door latch mechanism. The plaintiff received a jury verdict for $55,000 based upon a strict tort liability theory. The district court overruled the defendant's motions for a new trial or in the alternative for judgment notwithstanding the verdict. On appeal, a divided Eighth Circuit panel affirmed the action of the trial court. Judge Lay wrote the majority opinion with which

1. 534 F.2d 795 (8th Cir. 1976).
2. The two prior cases were Riha v. Jasper Blackburn Corp., 516 F.2d 840 (8th Cir. 1975), and Sherrill v. Royal Indus., Inc., 526 F.2d 507 (8th Cir. 1975).
3. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter referred to as section 402A in the text].
4. 187 Neb. 428, 191 N.W.2d 601 (1971). The court's decision was far from unanimous, with three of the seven justices filing dissenting opinions. All dissenting opinions were concerned with the issue of legal causation.
5. Melia v. Svoboda, 191 Neb. 150, 214 N.W.2d 476 (1974).
6. *Id.* at 152, 214 N.W.2d at 477.

Judge Henley concurred. Judge Bright filed a detailed, and compelling dissent. The ultimate issue concerned the criteria to be applied in a strict liability action to determine whether or not the design of a product is such that it should be considered "defective."

This note will demonstrate that the majority misconstrued prior decisions of both the Nebraska Supreme Court and the Eighth Circuit, and failed to enunciate a useful standard for design defect cases. Moreover, recovery was allowed for what was found to be an enhanced injury when in fact the plaintiff introduced no evidence whatsoever from which the jury could properly infer that the decedent's injuries would have been any less if the alleged defect had not existed.

II. PRIOR NEBRASKA LAW

Strict liability in tort for products other than food items first was recognized in Nebraska in *Kohler v. Ford Motor Co.*[7] There, the plaintiff sustained serious personal injuries when her car left the highway and overturned, apparently because a tooth on the stearing gear broke. Citing the landmark decisions of *Henningsen v. Bloomfield Motors, Inc.*,[8] a case with strikingly similar facts, and *Greenman v. Yuba Power Products, Inc.*,[9] the Nebraska Supreme Court entered the era of strict products liability: "We hold that a manufacturer is strictly liable in tort when an article he placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a human being rightfully using that product."[10] The court listed, and apparently approved, the trial court's jury instructions which included a requirement that "[t]he defect, if it existed, made the automobile unreasonably dangerous and unsafe for its intended use."[11] Thus, from the beginning, the "unreasonably dangerous" requirement was an integral part of the plaintiff's burden of proof in Nebraska.

The Nebraska Supreme Court next commented on strict liability in *Hawkins Construction Co. v. Matthews Co.*[12] The issue there involved the propriety of recovery for purely economic losses, absent any personal injuries, under strict liability. The court de-

7. 187 Neb. 428, 191 N.W.2d 601 (1971).
8. 32 N.J. 358, 161 A.2d 69 (1960).
9. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
10. 187 Neb. at 436, 191 N.W.2d at 606.
11. *Id.* at 436, 191 N.W.2d at 607.
12. 190 Neb. 546, 209 N.W.2d 643 (1973).

cided that the policy considerations behind a manufacturer's liability to consumers did not necessarily carry over into the commercial area:

> If the loss is merely economic, the Uniform Commercial Code has given the purchaser an ample recourse under the particular provisions and requirements of the code. Placed broadly, it is the law of sales, and not the law of torts, which protects the buyer's interest in the benefit of his bargain.[13]

If *Hawkins* had said no more than this, it would have little application to *Melia* which was a personal injury action. However, the trial court in *Hawkins* had submitted the case to the jury with instructions which completely intermingled warranty and strict liability concepts. At first glance, this would seem to require a new trial. Yet the court salvaged the jury's verdict through sound legal logic and in the process cast light on the issue of proof of defectiveness in a products liability action:

> As we have already pointed out, the issue that the product was defective, that the defect existed at the time the product left the manufacturer's control, that the product reached the consumer substantially unchanged, and was the proximate cause of the damage, were issues all resolved against the defendants by the jury and we will not disturb them. *These issues are, in substance, identical issues that are necessary to prove under the strict tort theory.*[14]

In addition, the court commented on defenses available in strict liability.

> It is clear that traditional "contributory negligence" in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort, or for a breach of warranty. Assumption of risk and misuse of the product are. Restatement, Torts 2d, § 402A, Comment n, p. 356.[15]

Thus, while denying recovery under strict liability in tort principles, the court augmented its prior adoption of section 402A by narrowing the defense of contributory negligence to those categories known as assumption of risk and misuse of product. It also stated the criteria for determining defectiveness as essentially the same under either warranty or tort causes of action.

The third Nebraska case involving strict liability, *Friedrich v. Anderson*,[16] was recognized by both the majority and the dissent in *Melia* as controlling. In *Friedrich*, the Nebraska Supreme Court joined those jurisdictions that followed the Eighth Circuit's leading

13. *Id.* at 562, 209 N.W.2d at 653.
14. *Id.* at 566, 209 N.W.2d at 655 (emphasis added).
15. *Id.* at 567, 209 N.W.2d at 655.
16. 191 Neb. 724, 217 N.W.2d 831 (1974).

decision of *Larsen v. General Motors Corp.*[17] The Nebraska court held that car manufacturers must anticipate that their products will be involved in collisions and therefore they can be held liable for injuries resulting from a defect in the product which, though it did not cause the accident, *increased the injury* resulting from it. Thus the court held that a cause of action would exist for the "second impact" or "enchanced injury" liability. However, while holding that Nebraska would follow *Larsen,* the court in *Friedrich* sustained a summary judgment for the defendant Chrysler, holding that *as a matter of law,* the design of the shift lever which injured the plaintiff's eye as the result of the collision, did not create "a foreseeable and unreasonable risk of harm."[18] The court held that:

> NJI No. 11.03 contains what seems to be a comprehensive and accurate statement of the law applicable to this situation and is in accord with what we think to be the better reasoned rule relating to "second impact" or enhanced injuries. We therefore hold that a manufacturer of goods has a duty to use reasonable care in the design of goods to protect those who will use the goods from unreasonable risk of harm while the goods are being used for their intended purpose or any purpose which could be reasonably expected.[19]

The court applied the above test to the summary judgment motion and held that:

> All the evidence relating to the claimed duty of the defendants to the plaintiff in the design of the gearshift lever knob is before the court and is undisputed, and in our opinion is not sufficient that reasonable minds could properly find that the defectively designed product created a foreseeable and unreasonable risk of harm. In other words, there was no substantial competent evidence from which one reasonably could draw an inference of negligence on the part of defendants proximately causing plaintiff's injuries. Accordingly, the action of the trial court in granting summary judgment was correct and is affirmed.[20]

The significance of this statement lies in the fact that although the plaintiff in *Friedrich* sought to recover under theories of negligence, strict liability, and implied warranty, the Nebraska Supreme Court spoke entirely in terms of what are traditionally considered negligence concepts and standards. While other commentators have reached different conclusions,[21] the case seems to hold that,

17. 391 F.2d 495 (8th Cir. 1968).
18. 191 Neb. at 733, 217 N.W.2d at 836.
19. *Id.* at 731-32, 217 N.W.2d at 836.
20. *Id.* at 732-33, 217 N.W.2d at 836-37.
21. *See* Note, *Second Impact Liability in Nebraska,* 54 NEB. L. REV. 172, 179 (1975); Casenote, 8 CREIGHTON L. REV. 233, 242 (1974).

at least in Nebraska, the criteria for determining liability in a case involving product design is the same under all three theories. This view provides a firm foundation for the dissent in *Melia* that, as a matter of law, the design of the car door was not "defective."

This conclusion is supported by the fourth, and most recent, Nebraska Supreme Court case dealing with strict liability. *McDaniel v. McNeil Laboratories*,[22] was decided after *Melia* and thus, was not available for consideration by the Eighth Circuit. Nonetheless, the holding of the case is germane to this discussion. The plaintiff in *McDaniel* was injured as a result of the anesthetic she received during an operation. The jury returned a verdict in favor of the defendant and the plaintiff appealed, alleging that the trial court erred in submitting the case to the jury only upon the theory of negligence and eliminating the theories of express and implied warranties and strict liability. In sustaining the trial court's action, the Nebraska Supreme Court reviewed comments[23] to section 402A and held:

---

22. 196 Neb. 190, 241 N.W.2d 822 (1976).
In *McDaniel*, the plaintiff sued five defendants, although only the issue of the liability of the manufacturer went to the jury.

23. Portions of several comments to section 402A are appropriate and pertinent here.

> . . . .
>
> Comment i, page 352, provides in part: "The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. * * * The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."
>
> . . . .
>
> Comment k, page 353, to section 402A, is peculiarly appropriate and directly applicable here. . . . "The seller of such [unavoidably unsafe] products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk."
>
> . . . .
>
> . . . In essence, it might be said that plaintiffs contend that a fixed ratio combination of two drugs is improper drug design and is therefore unreasonably dangerous.
>
> . . . .
>
> Innovar was approved by the Food and Drug Administration on January 31, 1968. . . .
>
> . . . .
>
> While approval by the Food and Drug Administration is not necessarily conclusive, its determinations, based upon the opinions and judgment of its own experts, should not be subject to challenge in a product liability case simply because

> In this case there is no essential conflict as to the facts and the evidence. There is a difference of opinion among expert witnesses as to whether those facts establish that Innovar is or is not a defective and unreasonably dangerous drug. . . . An unavoidably unsafe drug which has been approved for marketing by the United States Food and Drug Administration, properly prepared, compounded, packaged, and distributed, and accompanied by proper approved directions and warnings, *as a matter of law, is not defective nor unreasonably dangerous,* in the absence of proof of inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection *with such federal approval or later revisions thereof.*[24]

This is consistent with the holding in *Friedrich.* After setting forth the duty of an auto manufacturer in the design of his product, the *Friedrich* court added this caveat:

> However, an automobile manufacturer is not an insurer that its product is, from a design viewpoint, incapable of producing injury. Furthermore, in the application of the general rule, whenever a "second impact" or enhanced injury occurs, this should not be an open invitation to a jury to speculate as to the issue of foreseeability or the unreasonableness of the risk of harm. This is no different than in any other tort case in which there is always the preliminary question of law for the court "not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."[25]

Thus the Nebraska Supreme Court in *McNeil,* as in *Friedrich,* held that before the issue of strict liability is submitted to the jury, the trial judge, when called upon by a motion for a directed verdict, must determine whether as a matter of law the product in question is reasonably safe and thus not defective.

The majority's opinion in *Melia* recognized this requirement and attempted to address it, holding that "[a]n analysis of the record here reveals sufficient evidence of unsafe design creating a foreseeable and unreasonable risk of harm."[26]

The analysis of the majority[27] may seem persuasive until one reads Judge Bright's dissent:

> some other experts may differ in their opinions as to whether a particular drug is reasonably safe . . . .

Id. at 197-200, 241 N.W.2d at 826-28.

24. *Id.* at 200-01, 241 N.W.2d at 828 (emphasis added).
25. 191 Neb. at 732, 217 N.W.2d at 836 (citation omitted).
26. 534 F.2d at 798.
27. Two well qualified professional engineers testified for the plaintiff that the door latch deviated from safety engineering practice and was not protected from horizontal external forces which could release the latch. In their opinion the collision to the car had only a "brushing" horizontal effect on the door and

> The majority opinion leaves an impression that this accident resulted from a slight impact. That is not the case. Plaintiff's experts were clear that the fairly modest glancing impact on the Mustang door was followed within "milliseconds" by a very severe blow to the rigid quarter pillar and rear wheel. The speed, angle, sequence, and timing of the two impacts had to properly coincide to open the door in the manner alleged by plaintiff. . . .
>
> . . . .
>
> However, neither of plaintiff's experts was able to express any opinion of the likelihood that an automobile would be exposed to the concurrence of all of the facts necessary to activate the latch and open the door.[28]

After discussing and citing extensively from *Friedrich*, Judge Bright concluded:

> The plaintiff's case showed that any unlocked door latch on the modern automobile can open, given the appropriate application of forces in a collision, and uncontradicted evidence showed that the Mustang latch was less dangerous in actual collisions than any other latch then being manufactured. . . .

---

the latch had no "fail-safe" mechanism to prevent the car door from flying open.

Mr. Egerer, one of the plaintiff's engineers, testified that the door latch was designed in such a manner that it would open upon *very slight impact.* Using visual exhibits, he showed the trial court and the jury the door latches used on the 1968 Lincoln, Ambassador, Plymouth and Chevrolet. Each of these latches in his opinion contained a fail-safe mechanism, unlike the 1968 Mustang. Both Mr. Egerer and Mr. Klein, plaintiff's other expert, testified that the design involved did not conform to accepted engineering standards.

. . . .

Defendant's argument is that the defect did not, as a matter of law, create a foreseeable and unreasonable risk of harm. We cannot agree. . . . For this court to rule that a jury could not find an unreasonable risk of harm from a car door opening upon slight impact, would require us to ignore the record as well as common experience.

Id. at 798-99 (footnotes omitted).

28. *Id.* at 802-03 (footnotes omitted). The dissent continued:

> The only information of which they were aware was a crash study conducted in 1969 by Cornell University. That study showed that of all major American makes of automobiles, Ford's equipped with the very latch used on decedent's Mustang had the lowest rate of doors opening during collisions. Plaintiff's experts had compiled an exhibit of other types of American automotive door latches which they used by way of contrast to illustrate the "design defect" in the Mustang latch. Interestingly enough these were the precise latches to which the Mustang latch was compared in the Cornell study. The plaintiff's experts conceded that each of these other latches could open upon impact—in other words, would not "fail safe" upon impact in certain circumstances dissimilar to those in the present case.

Id. at 803-04.

> On the basis of this Nebraska rule of law, [*Friedrich*] we should reject the jury verdict in the present case.[29]

The dissent argued that the car in question, was reasonably safe as a matter of law.

The plaintiff's expert did assert that a slightly different design would have averted this particular accident. But Judge Traynor, the author of the *Greenman* decision, has recognized that such an *ex post facto* determination begs the question, for it is hard to conceive of an accident that could not have been avoided by a slightly different design.[30] Here, however, the plaintiff produced no statistical evidence of the likelihood of occurrence of the peculiar sequence of events which led to the door opening. Indeed, if the repositioning of the pivot point advocated by the plaintiff's expert had been carried out, the door mechanism might not have been any safer *overall.* It is widely recognized that something as complex as the design of a door-locking mechanism is the product of numerous conscience engineering decisions.[31] Each part is integrated into the whole system and the alteration of a single element could have a disasterous result on the performance of the product as a whole.

III. PRIOR EIGHTH CIRCUIT DECISIONS

The *Melia* decision not only diverged from Nebraska law, but from past Eighth Circuit decisions as well. This is most apparent when *Melia* is compared to *Larsen v. General Motors Corp.*,[32] a negligence action which applied Minnesota law. The court in *Larsen* said:

> We do agree that under the present state of the art an automobile manufacturer is under no duty to design an accident-proof or fool-proof vehicle or even one that floats on water, but such manufacturer is under a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision. Collisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable.
>
> . . . .

29. *Id.* at 804-05 (footnotes omitted).
30. *See* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 372 (1965).
31. *See* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973). This article contains a very thorough analysis of the difficulties inherent in evaluating complex design alternatives in an adversarial proceeding. Professor Henderson concludes that the area is one that is best governed by either traditional negligence or legislatively imposed standards.
32. 391 F.2d 495 (8th Cir. 1968).

> We, therefore, do not think the automotive industry is being singled out for any special adverse treatment by applying to it general negligence principles in 1) imposing a duty on the manufacturer to use reasonable care in the design of its products to protect against an unreasonable risk of injury or enhancement of injury to a user of the product, and 2) holding that the intended use of an automotive product contemplates its travel on crowded and high speed roads and highways that inevitably subject it to the foreseeable hazards of collisions and impacts.[33]

To construe *Larsen* properly it is necessary to read it in light of *Schneider v. Chrysler Motors Corp.*,[34] another auto design defect case decided by the Eighth Circuit only seven months after *Larsen* and applying Nebraska rather than Minnesota law. In *Schneider*, the plaintiff sought to recover for lacerations he received from a microscopic cutting edge on his car's vent window. The trial court entered judgment for the defendant notwithstanding a jury verdict for the plaintiff, and the plaintiff appealed. He had sought recovery under negligence and implied warranty theories. On appeal, he also urged the adoption of strict liability under section 402A. The appellate court sustained the defendant's verdict on the negligence issue on the ground that, as a matter of law, the plaintiff had not shown an unreasonable risk of injury as defined in *Larsen*. In a footnote, the court commented that the "range and type of accidents that can and will occur are pragmatically infinite but even on hindsight this unfortunate accident is not reasonably foreseeable."[35] The more interesting portion of the decision involves the disposition of the implied warranty and strict liability claims. The court cited a well-known treatise for the proposition that

> . . . by and large, the standard of safety of goods is the same under the warranty theory as under the negligence theory. In both actions the plaintiff must show (1) that the goods were unreasonably dangerous * * * for the use to which they would ordinarily be put * * *.[36]

The court then affirmed the trial court's judgment on the implied warranty claim, agreeing that as a matter of law the vent window was not unreasonably dangerous. It must be inferred that the court considered the issue of unreasonable danger, and hence defectiveness, to be the same under implied warranty and strict liability theories. If there was any doubt as to the issue at that time, the

33. *Id.* at 502-04.
34. 401 F.2d 549 (8th Cir. 1968).
35. *Id.* at 557 n.10.
36. *Id.* at 558 (citing 2 HARPER & JAMES, THE LAW OF TORTS § 28.22, at 1584 (1956)).

Nebraska Supreme Court has explicitly so held in *Hawkins Construction Co. v. Matthews Co.*[37]

IV. DESIGN DEFECTS

It is clear that at the time of the adoption of "second impact" liability in *Larsen*, the legal criteria for determining whether a product was unreasonably dangerous and therefore defective were the same under theories of negligence, implied warranty and strict liability. It was this theory of liability for enhanced injuries that the Nebraska Supreme Court, relying on *Larsen*, adopted in *Friedrich*, and it was this concept of defectiveness that the Eighth Circuit was bound to apply in *Melia*. Thus in Nebraska there was only one cause of action for defective design, though it had three different names. Whether a petition is one for breach of an implied warranty, negligent design, or strict liability for defective design does not matter. The criteria for evaluating the product are the same for all three: is there "substantial competent evidence from which one reasonably could draw an inference of negligence on the part of defendants proximately causing plaintiff's injuries[?]"[38]

The majority's opinion can be read as evidencing an awareness of this standard. Indeed, in its first footnote it quoted at length from *Dreisonstok v. Volkswagenwerk, A.G.*[39] Yet, if the majority were satisfied with the Fourth Circuit's analysis of *Larsen*, it is curious that it ignored this analysis in *Melia*. The issue in *Dreisonstok* was the propriety of a verdict for the plaintiffs in an action before the district court judge without a jury. The appellate

37. 190 Neb. 546, 209 N.W.2d 643 (1973).
38. Friedrich v. Anderson, 191 Neb. at 733, 217 N.W.2d at 836-37.
39. 489 F.2d 1066 (4th Cir. 1974).

> The key phrase in the statement of the *Larsen* rule is "*unreasonable risk* of injury in the event of a collision", not foreseeability of collision. The latter circumstances is assumed in collision cases under the *Larsen* principle; it is the element of "unreasonable risk" that is uncertain in such cases and on which the determination of liability or no liability will rest. It would patently be unreasonable "to require the manufacturer to provide for every conceivable use or unuse of a car." Nader & Page, Automobile Design and the Judicial Process, 55 Cal. L. Rev. 645, 646. Liability for negligent design thus "is imposed only when an unreasonable danger is created. Whether or not this has occurred should be determined by general negligence principles, which involve a balancing of the likelihood of harm, and the gravity of harm if it happens against the burden of the precautions which would be effective to avoid the harm." In short, against the likelihood and gravity of harm "must be balanced in every case the utility of the type of conduct in question."

534 F.2d at 797-98 n.1 (quoting *Dreisonstok*, 489 F.2d at 1071).

court reversed and remanded with direction to enter verdict for the defendant. The plaintiff's experts had established the purported defect by comparing the microbus, involved in the collision which produced the plaintiff's injuries, with a 1966 Ford passenger car. The reviewing court held that a comparison between such radically different vehicles was an inappropriate standard for determining reasonableness of the design. The court then held that from the evidence, the defendant was entitled to a verdict as a matter of law.[40] Thus *Dreisonstok* really was support for the dissent's, and not the majority's, position.

The other case cited by the majority warrants discussion on the issue of defectiveness with respect to design cases. *Hoppe v. Midwest Conveyor Co., Inc.*,[41] involved the design of a conveyor-hoist which had injured a factory worker. In reversing a directed verdict for the defendant, the Eighth Circuit, in an opinion by Judge Lay concluded that, under Missouri law, there was no difference between negligent design and strict liability. It is interesting to note that the appellate court directed that on remand the district court should admit evidence from plaintiff's expert that had been excluded in the first trial:

---

40. It, perhaps, may not be amiss to note that there is not substantial evidence to sustain a finding that as a result of the design of the microbus the plaintiff's injuries were enhanced. *Cf.*, Yetter v. Rajeski, *supra*, at pp. 108-109 (364 F. Supp.). In fact, the record seems clear that in any event the plaintiff, who had made no endeavor to protect herself with a seat belt, would have received severe injuries, irrespective of the type of vehicle she may have been riding in. There was testimony —which was not seriously questioned—that experiments conducted under the auspices of the Department of Transportation indicated that "the average barrier equipment velocity for fatalities, the mean velocity is only 33 miles per hour * * *." It may be that in every case the injuries may be somewhat different but any "head-on" collision at a speed of 40 miles an hour or more will result in severe injuries to the occupants of a vehicle and, certainly in 1968, no design short of an impractical and exorbitantly expensive tank-like vehicle (*see*, Alexander v. Seaboard Air Line Railroad Company, *supra*, 346 F. Supp. 320) could have protected against such injuries; in fact, it is doubtful that even such a vehicle could have. Can it be said that a manufacturer in 1968 must have, in its design, so built its vehicle as to protect against such an "unreasonable risk of injury"? We think not.
487 F.2d at 1076.

41. 485 F.2d 1196 (8th Cir. 1973). Unlike the Eighth Circuit, many other commentators and courts have distinguished between manufacturing and design defects. *See, e.g.*, Volkswagen v. Young, 272 Md. 201, 321 A.2d 737 (Ct. App. 1974); Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974); Powell & Hill, *Proof of Defect or Defectiveness*, 5 U. BALT. L. REV. 77 (1975).

> We think the court erred and was unduly restrictive in ruling on the admissibility of Dr. Dreifke's testimony on this subject matter. . . . Liability alleged from defective design encompasses many factors not generally relevant to ordinary negligence in tort cases. The comparative design with similar and competitive machinery in the field, alternate designs and post accident modification of the machine, the frequency or infrequency of use of the same product with or without mishap, and the relative cost and feasibility in adopting other design are all relevant to proof of defective design.[42]

It is precisely these elements that were missing from the plaintiff's evidence in *Melia*. The majority opinion cited no evidence of either the existence or the frequency of similar accidents involving car doors that pop open. Nor was there testimony from the plaintiff's experts as to the statistical likelihood of the unique series of events required to cause the door to pop open. Finally there was no evidence that the alternative design proposed was feasible in the sense that it was safer overall.

This complete absence of proof on the critical issues observed in light of the Nebraska Supreme Court's prior holdings, leads to the conclusion that the car in question was, as a matter of law, reasonably safe.

V. DRIVER'S CONDUCT

Even assuming that the question of the reasonableness of the danger presented was a proper question for the jury, the majority decision refused to allow the jury *all* of the information needed to determine the magnitude of the risk. The trial judge refused to admit evidence that the decedent had entered the intersection on a red light and may have been speeding. The majority dismissed this as irrelevant, yet the fact that the decedent entered the intersection illegally had a direct bearing on the statistical likelihood of the occurrence of the accident and thus the reasonableness and foreseeability of the danger.

The majority also found that "[t]he record shows no foundation for the admission of the speed of decedent's automobile."[43] It thus upheld the district court's refusal to admit the defendant's evidence on the issue. Although this may have been proper from an evidentiary point of view, it ignored the fact that the speed of the decedent's automobile was an essential element of the plaintiff's proof. It was conceded by plaintiff's experts that had the decedent's car been stationary in the intersection when hit by the

42. 485 F.2d at 1202 (footnotes omitted).
43. 534 F.2d at 800.

defendant's car, the door latch would not have come open.[44] Without knowing the speed of the decedent's car, it was impossible for any of the expert witnesses to estimate the mechanical forces necessary to cause the latch to fail[45] and more important, none could testify as to the general statistical likelihood of the concurrence of events necessary to produce this particular accident. The absence of any proof by the plaintiff on this crucial element of her case[46] alone should have justified a directed verdict for the defendant.

---

44. The plaintiff's expert, Mr. Egerer, when discussing the angle of the vehicles and their speed, testified that "if it had been a 90-degree collision, the door could not have opened because the force and the obstacle would have been in front of it, and although the jaws may have opened in the latch mechanism, the door could not have opened." Transcript, vol. 1, at 170, Melia v. Ford Motor Co., No. CV 73-0-121 (D. Neb. 1975). He later conceded that with different accidents, different collisions, or different configurations, that different results with the same latches would occur. *Id.* vol. 1, at 225.

45. Plaintiff's accident-reconstruction expert, Mr. Klein, in response to the question, "[d]o you know what the rate of peneration of that Volkswagen automobile was into the side of this door?" replied:

> No, I have no way of knowing.
>
> . . . .
>
> There is no way of telling because we don't know which vehicle absorbed specific amounts of energy because both vehicles absorbed some of the kinetic energy of impact, so from looking at the vehicles you have no way of knowing, other than measurements of the final deformations.

Id. vol. 1, at 328.

The testimony of the defendant's expert, Mr. Tiede, demonstrates how unsuited courts and lawyers are to deal with technological problems.

> Q. Now, Mr. Cannon asked you about conducting a test to duplicate the forces here. Is there some reason why you didn't do that?
> A. Yes, sir, there is.
> Q. And what is that?
> A. There is just no way I could have run a test that would have been acceptable for anyone here because we didn't know enough about what angles to be used and speeds to be used and this kind of thing.
> Q. You never had the speed of the Mustang, did you?
> A. That's right, sir. We would have had to really run a crash test to do a full car test . . . .

Id. vol. 2, at 441-42.

46. The omission of any evidence as to the speed of the decedent's auto was deliberate on the part of plaintiff's counsel. While objecting to an offer of proof, *in camera*, he stated: "Your Honor, I don't think that either the record nor the Pre-Trial Order states one way or another whether she was in fact in motion at the time of this accident." *Id.* vol. 2, at 452. Thus the jury was allowed to find that the decedent's car was unreasonably dangerous without any idea of the

VI. ENHANCED INJURY

The speed of the decedent's automobile was crucial to this case for another reason. Because Ford was liable only for the extent to which the decedent's injuries exceded what they would have been had the door mechanism not been "defective," the speed of the car was an important element for determining what her injuries would have been "but for" the door coming open. It was readily admitted by the plaintiff's experts that there was no causal relationship between the alleged defect in the door mechanism and the occurrence of the impact. Prior to *Larsen*, this alone would have been sufficient to deny liability. *Larsen* changed this, but it did not relieve the plaintiff of the burden of proving a causal relationship between her "enhanced injuries" and the alleged defect. No doubt, one of the reasons that auto manufacturers resisted "second impact" liability so vigorously was that they feared liability for the entire amount of damages in any auto accident involving a noncausal defect.

In *Larsen*, the Eighth Circuit indicated that this would not be the case:

> Any design defect not causing the accident would not subject the manufacturer to liability for the entire damage, but the manufacturer should be liable for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design. The manufacturer argues that this is difficult to assess. This is no persuasive answer and, even if difficult, there is no reason to abandon the injured party to his dismal fate as a traffic statistic, when the manufacturer owed, at least, a common law duty of reasonable care in the design and construction of its product. The obstacles of apportionment are not insurmountable.[47]

Although, according to *Larsen*, apportionment is possible, the burden should be on the plaintiff to produce the evidence upon which the apportionment can be made. The plaintiff's medical expert testified that the injuries that caused the decedent's death occurred after she was thrown from the car. Yet he did not express any opinion as to what her injuries would have been had the door remained closed. Here again, evidence of the speed of the decedent's car was crucial. From the evidence, without any expert testimony for guidance, how could the jury possibly apportion the plaintiff's damages by any permissible method?[48] The auto-

speed it was traveling at the time of the accident or even if it was moving.

47. 391 F.2d at 503.

48. The sole evidence as to the relative safety of remaining in the car as

makers' worst fears expressed in *Larsen* may have come to fruition in *Melia*. Ford Motor Company was held liable for injuries from an auto accident which was not directly caused by any defect in its automobile, and with absolutely no evidence from which the jury could apportion the damages.

The controversy discussed above regarding contributory negligence, misuse of the product and assumption of the risk, might be alleviated if the Eighth Circuit would give trial courts adequate guidance for the proper instruction of a jury in an enhanced injury action. The opportunity was present in *Polk v. Ford Motor Co.*,[49] a case preceding *Melia* by more than three months. *Polk* involved a Ford auto which was hit in the rear by a car proceeding in the same direction at a speed of about 90 to 100 miles per hour. The plaintiff's auto careened off a retaining wall, overturned, and slid about 100 feet before coming to rest on its top. The roof supports collapsed and the car burst into flames. The driver escaped with severe burns but a passenger was trapped inside and died. The appellate court, sitting *en banc*, first held that Missouri law would allow recovery for enhanced injury. The defendant then challenged the propriety of the jury instructions, alleging that they

---

opposed to being thrown out was in the following cryptic exchange between plaintiff's counsel and his accident expert.

> Q. My question is, what is the fact, if you get thrown out of a car, are you better off or not?
>
> A. Well, statistics have shown almost conclusively by studies performed by the National Safety Council, by the National Highway Traffic Safety Administration, over long periods of time, and based upon injury research and so forth, that passengers expelled from an automobile have about a five per cent chance of being killed.

Transcript, vol. 1, at 279, Melia v. Ford Motor Co., No. CV 73-0-121 (D. Neb. 1975). According to this testimony there is a five percent probability of death occurring to a passenger who is expelled from an automobile, but there is no indication from this testimony that a passenger's chances for survival are any better if he remains in the vehicle. There is nothing in the record (the study was not offered into evidence) which would indicate that the plaintiff's decedent had any chance of surviving the impact of the crash even if she had remained in the auto. In fact, the only evidence touching upon the issue provided by plaintiff's medical expert, Dr. Lewis, points to the opposite conclusion.

> To the extent that she was injured as I have described, those types of injuries are not of the ordinary variety that would come without a tremendous impact. In other words, a liver that is split in half, a skull that is fractured to the great degree that she had, and the injury to her chest and her ribs and her broken clavicle, I would have to assume that this happened with a great impact force.

Id. vol. 1, at 197.

49. 529 F.2d 259 (8th Cir. 1976).

allowed the plaintiffs to recover for all of their damages and not just for the enhanced injury. The portions of the charge objected to read:

> *[T]here can be no recovery by the plaintiffs unless it appears that the injuries and damage complained of were proximately caused or contributed to be caused by the act or acts constituting the defective condition of the automobile.*
>
> . . . .
>
> . . . [M]any factors or things or the conduct of two or more persons may operate at the same time, either independently or together, to cause injury or damage, and in such a case, each may be the proximate cause.[50]

The court refused to hold that this instruction was erroneous. While it may have been correct that "a fair reading of the instructions quoted above is that there may be recovery only for those injuries which were caused by the defective design,"[51] the court should have required that the jury find specifically what the plaintiff's total damages were and what they would have been absent the defect. The difference then would be the amount for which the manufacturer would be liable.

This was the course chosen by the Third Circuit in *Huddell v. Levin*,[52] decided only two weeks after *Melia*. In this action, the plaintiff's decedent's auto had run out of gas and was stopped in the left most lane of a bridge in rush hour traffic. The defendant's auto ran into the stopped car from the rear at between 50 and 60 miles per hour. The decedent's skull was severely injured and the plaintiff theorized that the design of the headrest on the car's driver's seat was defective and thus enhanced the driver's injuries. The appellate court reversed a jury verdict for the plaintiff, primarily because "[i]t was not established whether the hypothetical victim of the survivable crash would have sustained no injuries, . . . extensive and permanent injuries, or possibly paraplegia or quadriplegia."[53]

The court also found prejudicial error in two of the trial court's instructions. First, the jury was told that "if there is any substantial possibility that Dr. Huddell would have survived the collision had the headrest not been defective, assuming you find such a

---

50. *Id.* at 267-68 (emphasis in original).
51. *Id.* at 268.
52. 537 F.2d 726 (3d Cir. 1976). The idea that the plaintiff must prove that decedent would have survived the accident "but for" the claimed defect is hardly a new one. *See* Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 867 (1962).
53. 537 F.2d at 738.

defect, General Motors would be liable if such defect was a substantial contributing factor or a proximate cause of Dr. Huddell's death."[54] The instruction was clearly incorrect because:

> A plaintiff must prove his case by a preponderance of the evidence, proof of a "substantial possibility" of survival does not comport with that affirmative burden. Moreover, this instruction violated the basic jural conception upon which a crashworthy case is based, viz., that the automobile manufacturer is liable only for the enhanced injuries occasioned by the defectiveness of its product.[55]

Second, the trial court erroneously charged the jury "that the relative severity of the impact is not relevant . . . to your consideration of whether there was a defect in the design of the headrest."[56] The instruction was incorrect, according to the Third Circuit, because in a design liability case, "[t]he central issue is: was the product 'defective'? And this can only be evaluated in the context of a particular risk . . . . In the context of safety equipment, this means that the manufacturer is not required to design against extraordinary accidents of unusual circumstance or severity."[57]

In light of the absence of proof on crucial issues, and the erroneous instructions, the court reversed the verdict for the plaintiff and remanded for a new trial. It would have been appropriate for the Eighth Circuit to have taken similar action in the *Melia* appeal. It is regrettable that the court did not take the opportunity presented in *Melia* to clarify its earlier holding in *Polk* and to lay out definite guidelines for jury instruction in enhanced injury cases.

VII. CONTRIBUTORY NEGLIGENCE AND MISUSE OF THE PRODUCT

Assuming *arguendo*, that the door-lock mechanism in *Melia* was not reasonably safe as a matter of law, there still remained the question of what defenses, if any, were available to Ford Motor Company. Because the trial court refused to admit evidence that the plaintiff's decedent had run a red light and was driving at 60 miles per hour, the reviewing court was called upon to determine "whether evidence of contributory negligence is relevant in a product liability case based on strict liability under Nebraska law."[58] The majority opinion determined that language from

54. *Id.* at 740.
55. *Id.*
56. *Id.*
57. *Id.*
58. 534 F.2d at 801.

Hawkins was dispositive: "It is clear that traditional 'contributory negligence' in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort, or for breach of warranty. Assumption of risk and misuse of the product are."[59]

Hawkins must be read in context. It preceded *Friedrich* and the adoption of second-impact liability in Nebraska. Thus the Nebraska Supreme Court really has never discussed the issue of contributory negligence in a situation in which the "defect" was not the cause of the accident, but only contributed to the extent of the resulting injuries. Moreover, a careful reading of the dissents in *Kohler*, the case initially adopting strict liability in Nebraska, would indicate that at least three of the judges of the Nebraska Supreme Court would have been open to the argument that in some cases the plaintiff's conduct could bar his recovery.

The defenses set out in *Hawkins* must be read in light of the historical development of strict products liability. If a manufacturer's liability for a defective product were relieved simply because the injured user failed to discover the defect, the cause of compensating injured victims would have advanced little. It therefore made sense to eliminate that form of contributory negligence which consisted of failure to discover or guard against a given defect. Yet this left the rest of the body of negligence law intact. Because the concept of proximate cause eliminated liability entirely in those accidents caused *solely* by the plaintiff's own negligence, it may have been appropriate to conclude that the only affirmative defenses still available were assumption of the risk and misuse of the product. However, *Friedrich* changed that when it held a manufacturer liable for injuries even though no defect in the product had initially caused the accident. It thus breached the proximate cause defense that the quote from *Hawkins* relied upon. Thus *Hawkins* was not dispositive of the issue. In fact the opinion specifically set out misuse of product as a defense.

It is important to distinguish the duties imposed upon defendants by tort law from the defenses available to them. *Larsen* and *Friedrich* expanded the scope of the defendant auto-makers' duty by requiring them to consider the potentiality of collisions in the design of their vehicles. However, these cases did not alter the fact that a plaintiff still has the obligation to exercise due care for his own protection. The question then becomes: "What forms of plantiff's conduct will bar his recovery?"

In answering this question, it is important to remember the policy considerations behind strict liability. The chief purpose of

59. *Id.* (citing *Hawkins*, 190 Neb. at 567, 209 N.W.2d at 655).

strict liability may be risk-spreading. If this were the only purpose, there would be no reason to deny recovery in any case. The manufacturers' liability would be absolute and all injured consumers would be compensated. Yet the courts universally have avowed that this is not their purpose. Liability is imposed only when the product is "defective." But this is really no limitation at all in the case of "design defects" because it is usually possible, after an accident, to develop an engineering theory that would have minimized injuries if not avoided the mishap entirely. The only defenses remaining for the auto manufacturers to preclude absolute liability are the defenses of assumption of the risk and misuse of the product.

The defense of assumption of the risk is of little use in design defect cases. It would be rare that the ordinary consumer might discover and appreciate the danger of a defect which skilled designers and engineers failed to recognize and appreciate. This is especially true in second-impact cases where the potential for enhanced injuries is usually not apparent until after the accident.

The only remaining effective defense for an auto manufacturer in an enhanced injury design defect case is misuse of the product. *Larsen* and its progeny hold that merely being in a collision is not misuse of an auto *per se*, because such a happening is readily foreseeable. It does not necessarily follow, however, that every car accident victim should be compensated by the auto manufacturer. If liability is not to be absolute, there must be some way to distinguish those drivers who have misused their autos from those who have not. This can be done only by admitting all of the evidence of the circumstances surrounding the accident including the conduct of the drivers. The jury, applying some sort of reasonable person criteria, would be required to determine whether this particular misuse of the product was so inexcusable as to deny recovery. If such a test had been applied in *Melia*, the fact that the plaintiff's decedent had run a red light and was possibly speeding would have been highly relevant.

VIII. COMPARATIVE NEGLIGENCE

Finally, the appellate court held that the trial court properly refused to instruct the jury on the issue of comparative negligence. The court indicated that the issue had been decided by the Nebraska Supreme Court in *Hawkins*, where it was held that only those forms of contributory negligence known as "assumption of the risk" and "misuse of the product" would be available in a strict liability action. Yet neither *Hawkins* nor *Friedrich* dealt with the issue of

contributory negligence in enhanced injury cases. Particularly in light of the three dissenting opinions as to the issue of causation in *Kohler*, the issue was not a closed matter under Nebraska law.

The majority opinion can be read as saying that as a matter of law, the defense of assumption of the risk was unavailable, for it found that "[c]learly, there is no evidence that the decedent's alleged conduct of entering an intersection on a red light was intentional rather than inadvertent."[60] Likewise, it can be argued that a misuse of product defense is unavailable, in an enhanced injury auto accident action, because the use of the product, a collision, is foreseeable as a matter of law under *Larsen*. Yet these rationales are not supported by the conclusions reached by the trial judge. At the jury instruction conference, the plaintiff objected to the giving of instructions on assumption of the risk and misuse of the product. The trial court overruled these objections, implicitly finding that there was some evidence which might justify the jury in denying liability. If this were the case, that same evidence would have been relevant to the issue of comparative negligence. It is inconsistent to say that there is evidence upon which a jury could find no liability on the part of the defendant based on contributory negligence by the plaintiff's decedent, but that there is no evidence upon which the jury could find concurring negligence which might require mediation of damages. Either such evidence existed, in which case the trial court erred in failing to instruct on the contributory negligence statute, or it did not exist, in which case the trial court erred, though not prejudicially, by incorrectly instructing on the issues of assumption of the risk and misuse of product. Thus the majority's conclusion that "[i]n view of the overall status of Nebraska law at this time we cannot say the trial court reached an interpretation of the law on this issue which is in conflict with Nebraska law on strict liability,"[61] is unsound.

Nor is the court's alternative reasoning persuasive: "We additionally observe the application of the Nebraska comparative negligence statute would, under the language of the statute, be ex-

60. *Id.* It is doubtful whether this is a proper conclusion under Nebraska law. Approximately six months earlier, the Eighth Circuit held, in Sherrill v. Royal Indus., Inc., 526 F.2d 507 (8th Cir. 1975) (applying Nebraska law), that the district court correctly declined to give plaintiff's requested instruction "that inadvertence, momentary inattention, [or] diversion of attention . . . do not constitute assumption of even the most obvious risk . . . [since it was] without merit." *Id.* at 510 (footnotes omitted). Ironically, the *Melia* majority cited *Sherrill* on the next page of its opinion for a different proposition, without any mention of its holding with regard to assumption of the risk.

61. 534 F.2d at 802.

tremely confusing and inappropriate in a strict liability case."[62] This directly conflicts with the argument in *Larsen* for the prorating of damages in enhanced injury cases where the court stated that: "The obstacles of apportionment are not insurmountable. It is done with regularity in those jurisdictions applying comparative negligence statutes . . . ."[63]

The court did not explain its conclusion that a concept which could be handled by juries in 1968 was "extremely confusing and inappropriate" in 1976. The assertion by the court that "[i]n strict liability cases proof of negligence or degree of fault is not required"[64] is a mere conclusion based on circular reasoning. If the comparative negligence statute is applicable, then clearly degree of fault becomes a necessary element of the juries' conclusions.

The court's reluctance to apply Nebraska's comparative negligence statute may not have been based upon any theoretical ground, but rather on a dislike of the precise wording of the statute chosen by the state's legislature. The court found the statute "extremely confusing and inappropriate in a strict liability case" because "[u]nder Nebraska law in order for the comparative negligence statute to be invoked the plaintiff's negligence must be slight and the defendant's negligence gross in comparison thereto."[65] While the statute may be inartfully drafted, this hardly justifies a federal court, under *Erie R.R. v. Tompkins*,[66] ignoring it.

IX. CONCLUSION

In *Melia v. Ford Motor Co.* the Eighth Circuit had an opportunity to issue a landmark decision in the area of design defects comparable to the precedent established by *Larsen v. General Motors Co.* Instead, under the guise of applying state law, it circumvented Nebraska case law and statute requiring the allocation of damages between parties when both are responsible for the injury. The court failed to give any legal criteria for determining the existence of a design defect. Moreover, the court failed to ask, or to allow the jury to have the evidence to determine, whether the policy considerations behind strict liability required its application in this instance. Leading commentators agree that the issue to be resolved in an enhanced injury case is who can best exercise judgment to avoid the loss.[67] Ford Motor Company designed the

62. *Id.*
63. 391 F.2d at 503.
64. 534 F.2d at 802.
65. *Id.*
66. 304 U.S. 64 (1937).
67. *See, e.g.*, Calabresi & Hirschoff, *Toward a Test for Strict Liability in*

best door mechanism consonant with the "state of the art." In fact, according to one study, it was statistically the safest door of any cars tested. On the other hand, the plaintiff's decedent failed to lock her door, failed to wear her seat belt, and failed to stop for a red light. Thus Ford Motor Company was held liable for a conscious design choice it made more than five years[68] prior to the accident and no part of the liability was assessed to the decedent who had three obvious opportunities to avoid the injury, which required little effort or foresight. Moreover, the plaintiff failed to introduce any evidence from which the jury could apportion the damages or even conclude that the alleged defect enhanced the decedent's injuries.

The prime justification for such a holding would appear to be loss distribution.[69] Yet there is a limit to how much loss distribution a society is willing and able to afford. What is required is a balancing of the cost of insurance versus the safety obtained and the responsibility of the individual for his own acts. The unenthusiastic response of state legislatures and the electorate to "no-fault" insurance indicates that there are limits to how much the public is willing to pay for complete protection from all risk of harm.

The First Circuit recently stated that it is important to keep the overall societal purpose and impact of strict liability in mind in each case: "Product liability in the individual case is paid for by the manufacturer, or its insurer, but in the long run whatever standard has to be met is reflected in the cost of the product."[70]

Torts, 81 YALE L.J. 1055, 1061 (1972); Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEX. L. REV. 81, 90 (1973).

68. A number of commentators have advanced the concept of "negligence with hind sight" as a way of evaluating a manufacturer's product. In other words, would a reasonable manufacturer, with all of the knowledge available at the time of trial, still put the product on the market? *See* Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 568 (1969); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 839 (1973); Comment, *Elimination of "Unreasonably Dangerous" from § 402A—The Price of Consumer Safety?* 14 DUQ. L. REV. 25, 44 (1975). There is no evidence that the Nebraska Supreme Court would adopt such a view.

69. Professor William Prosser dismissed loss distribution as a makeweight argument in Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 800 (1966). Most writers tend to justify strict liability in terms of enterprise liability and risk spreading. *See, e.g.*, Comment, *Continuing the Common Law Response to the New Industrial State: The Extension of Enterprise Liability To Consumer Services*, 22 U.C.L.A. L. REV. 401, 447 (1974).

70. Mitchell v. Ford Motor Co., 533 F.2d 19, 21 (1st Cir. 1976). Products

The majority in *Melia* again parrotted the language that strict liability "was not intended to make the manufacturer an insurer of the safety of the automobile's occupants under all circumstances."[71] However, the court failed to articulate any workable standard that prevents the defendant's liability from being absolute. The dissenting conclusion of Judge Bright bears repeating:

> This case virtually makes the manufacturer the insurer of the safety of the occupants of an automobile and would impose a duty upon the automobile manufacturer to construct an automobile in such a way as to avoid injury to the occupants under almost any possible impact situation. To cast such a burden upon the manufacturer of an automobile is impractical and uneconomic.
>
> No doubt the manufacturers of automobiles could design and build an automobile with the strength and crash-damage resistance features of an M-2 army tank. I believe the average and reasonable automobile user desires only a reasonably safe, economical form of motor transportation. No greater burden of design-performance ought to be imposed upon automobile manufacturers by either judge or jury.[72]

Terry R. Wittler '77

---

liability litigation is effecting the cost of products and insurance. As in the medical malpractice area, sky rocketing premiums are inducing a number of manufacturers to "go bare." *See* Wall St. J., Oct. 27, 1976, at 4, col. 1. Others, particularly smaller manufacturers, are being forced out of business because their products liability insurance has been canceled or they have had to satisfy huge personal injury judgments. *See* Wall St. J., June 3, 1976, at 1, col. 5.

71. 534 F.2d at 797.
72. *Id.* at 803.